No. 3468

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt,

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

Respondent's Brief

MOTION TO DISMISS PETITION FOR REVISION AND BRIEF ON SAID MOTION AND ON SAID PETITION

Marsh Printing Co., Portland

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MOTION TO DISMISS PETITION FOR REVISION

Comes now the above named respondent, MacDonald-Wiest Logging Company, a corporation, by its attorneys, John Rustgaard, Thomas White and Arthur I. Moulton, and moves the court to dismiss the petition of E. L. Cobb, Trustee of the Estate of Craig Lumber Company, a corporation, bankrupt, upon the ground and for the reason that this

court has no jurisdiction to hear or determine the matters and things set forth in said petition for revision, and upon the ground and for the reason that the sole and exclusive remedy of said petitioner is by appeal under the provisions of section 25 of the Bankruptcy Act of the United States, and that inasmuch as more than ten days had elapsed after the making of the order herein sought to be revised at the time of the filing of the petition for revision aforesaid, this court is without jurisdiction to entertain said petition or to review or to revise said order.

Dated this 11th day of May, 1920.

JOHN RUSTGAARD,
THOMAS WHITE,
ARTHUR I. MOULTON,
Attorneys for Respondent.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, one of attorneys for MacDonald-Wiest Logging Company, a corporation, in the within entitled matter, do hereby certify that the foregoing motion is made in good faith and not for the purpose of delay, and is in my opinion well founded in law.

ARTHUR I. MOULTON.

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RESPONDENT'S BRIEF

On the Motion to Dismiss

This petition for revision is an attempt to proceed under the provisions of section 24-b of the Bankruptcy Act after the expiration of the time allowed for the taking of an appeal. The motion to dismiss is based upon the proposition that the order attacked by the petition to revise is an appealable order, within the provisions of section 25-a of the Bankruptcy Act. That section provides for the taking of appeals as in equity cases **inter alia** from a judgment allowing or rejecting a debt or claim of $500.00 or over. The order attacked by petition for revision is an order of the District Court of Alaska, Division No. 1, which in turn reverses an order of the Referee in Bankruptcy of that court, rejecting and disallowing the claim of MacDonald-Wiest Logging Company against the Craig Lumber

Company, bankrupt, for the sum of $27,871.50, with interest. The order disallowing the claim is in general terms and assigns no definite reason for the rejection. The reversal order is likewise general and assigns no definite reason for the reversal. The effect of the order of reversal is (stated on page 4 of the brief for the petitioner) to practically settle the controversy. In other words, the order is one allowing the claim, and it arises in a proceeding in bankruptcy, and more than $500.00 is involved.

Without elaboration, it is submitted that the rule of law stated by Mr. Justice Day, delivering the opinion of the United States Supreme Court, in the matter of Loving, 224 U. S. 183, 56th Law Ed. 725, conclusively determines this case. It was there held that an order allowing a claim and refusing to disallow it, although it was only opposed as a lien, was an appealable order under section 25-a. That the analogy between that case and this may not be overlooked, the court's attention is directed to the fact that the proceeding in the District Court was identical with the proceeding had here, with the exception that the order of the Referee allowed the lien claimed in the reported case but in the case at bar it was denied. In both cases, the order of the District Court overruled the objections and exceptions of the Trustee. Having determined that the order overruling the objections of the Trustee had the practical effect of an order allowing the claim and was appealable under section 25-a, the

Supreme Court then proceeded to definitely declare the rule that inasmuch as the order was an appealable one, it could not be reviewed after the expiration of the ten days allowed for appeal. Therefore, the thing that is attempted here has the definite disapproval of the United States Supreme Court, and we submit that the decision in that case settles and determines this case.

Upon the Merits of the Controversy

It is respectfully submitted that under the statute of Alaska, the objection that respondent had imperfectly qualified to do business in Alaska was available only at the election of the other party to the contract. We believe that the controlling provision of the statute of Alaska relating to the validity of contracts of this character is contained in section 657 of the Alaska Code, as amended by chapter 20 of the Session Laws of Alaska for 1917. Under this section the contract in question is not void, even if respondent had not complied with the law of Alaska, but is voidable merely and voidable only at the election of the other party to the contract. Therefore, the Trustee in Bankruptcy, who came into the matter after the contract had been in force and effect for more than a year, and the other party to it had exercised its election to treat the contract as valid and had permitted it to be fully performed by respondent, has no standing to question its validity.

With respect to the provisions of section 660, this may be said: They apply only to "contracts with citizens of the district." The Craig Lumber Company, like the respondent, is a Washington corporation and the contract with it was not a contract with a citizen of the District of Alaska. Not only this, but we believe a careful reading of all the provisions of the laws of Alaska, respecting the doing of business in the Territory, by private corporations, will lead to the conclusion that the provisions of section 657, as amended, are controlling and that such contracts are not in any event any more than "voidable at the election of the other party thereto."

Not only this, but there was a substantial compliance with the terms of the Alaskan law by respondent. Before it began any business in Alaska it did what its officers were advised was sufficient to entitle it to transact business. It made the contract the 2nd of January, 1918, and while the record furnished by the Trustee is inadequate in that respect, it is a fact that nothing was done in the way of performance of the contract for many months thereafter and no business was transacted under the contract until long after the respondent had filed all of the papers required of it under the Alaskan law. An examination of the claims of the Trustee shows that his objections are purely captious. In relation to the filings in the office of the Secretary, these were cured before any real busi-

ness was done. The words of the statute are that the contract in question, if not valid in the first instance, was only voidable at the election of the other party. Whatever defect existed was cured so early that the Craig Lumber Company would be estopped to claim that the contract was invalid after having accepted the benefits of performance of it, so long after it was cured. It is submitted that the annual statement, filed February 27, 1919, was in time and there was no default prior to that. The annual statement filed February 16, 1918, contained all that the law required.

All that was lacking in the filings with the Clerk of the District Court was the signature of L. J. MacDonald to the writing which he filed, accepting the appointment as agent. The statement filed here was in time, under a fair construction of the statute. The statement required by section 658 is patently a statement of the business of the corporation, and it was sufficient if it was filed within the first year the corporation did business.

In any event, there was a substantial compliance with the statute. Counsel on page 8 of the brief states that respondent "had apparently intended to comply with the law" and had taken some steps in that direction.

It is apparent that there was an honest attempt to comply with the law and enough was done that no harm could come to any person with whom the

corporation dealt. Its effort to comply with the law will be treated as a substantial compliance.

> Wash. Investment Ass'n. vs. Stanley, 38 Ore. 319; 63 Pac. 489; 84 Am. St. Rep. 793.
>
> Jordan et al. vs. Western Union Tel. Co., 76th Pac. 396.

In the case last cited the following language is used:

> "Aside from the fact that it was discretionary with the court to grant such permission at the time it was asked, we further note that there was a showing made by the telegraph company that it had in due time, under the terms of the law, made an effort to comply therewith in as full a degree as it was possible for it to do. If this attempt was technically insufficient, it would show an honest purpose and desire to comply with the law, and the court will not now reverse the action of the court below, because of the technical insufficiency of this compliance."

In the case of Washington Investment Association vs. Stanley, Supra, Mr. Justice Wolverton, one of the judges of this court, sitting as a member of the Supreme Court of the State of Oregon, referring to a Washington corporation, which was said to have transacted business in Oregon, and which had only six incorporators instead of ten, as required by the statute of Washington, used the following language:

> "The Association is at least a de facto corporation and may maintain suits and actions

> against those who have dealt with it to enforce their obligations and the state only can complain of its defective organization. 'When a body of men are acting as a corporation under cover of apparent organization, in pursuance of said charter or enabling act, their legal authority to act as a corporation cannot be questioned collaterally.' Taylor on Private Corporations, 4th Ed., Sec. 145. So that if there has been an apparent attempt to perfect an organization under the law and there has been user in pursuance of such attempt, the organization has acquired a de facto existence which will enable it to maintain its individuality against all attacks that may arise collaterally. Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552."

It is submitted that the deficiencies claimed in the compliance of respondent with the Alaskan law are not matters of substance; that no one could have been injured by them, and no person but the most captious and hypertechnical would treat them as having any real effect upon the business transactions of the parties in interest, much less as having the effect of depriving respondent of the work and expense put forth by it in furnishing the logs and lumber which now constitute by far the greater portion of the estate of the bankrupt.

Respectfully submitted,

JOHN RUSTGAARD,
THOMAS WHITE,
ARTHUR I. MOULTON,
Attorneys for MacDonald-Wiest Logging Company.